Dato' Samsudin bin Abu Hassan v Robert Kokshoorn

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-387 OF 2002
ABDUL HAMID MOHAMAD, ARIFIN ZAKARIA AND MOHD GHAZALI JJCA
28 MAY 2003

Arbitration *— Award — Setting aside — Arbitrator ruled evidence inadmissible — Whether such ruling an 'award' — Whether such ruling open to review — Whether such ruling could be set aside — Whether such ruling could be remitted to the arbitrator for reconsideration — Whether such ruling a 'matter' within s 23 of the Arbitration Act 1952 — Arbitration Act 1952 s 23*

The parties entered into an agreement whereby the appellant lent the respondent moneys to participate in the equity of a joint venture company to be established by the parties. The respondent failed to make payment as stipulated by the terms of the agreement. An arbitrator was appointed by the parties to arbitrate in the dispute between them. During the course of the arbitration proceedings, the respondent sought to admit, inter alia, evidence comprised of correspondence between the parties. The appellant objected to the admissibility of this evidence on the basis that the correspondence fell within the 'without prejudice' communications. After hearing arguments of counsel for the parties, the learned arbitrator ruled that the documents in question fell within the 'without prejudice' rule and were therefore inadmissible. The respondent applied to the High Court for an order that the award handed down by the arbitrator ('the said award') be set aside under s 24(2) of the Arbitration Act 1952 ('the Act') or in the alternative, that the said award be remitted to the arbitrator for his reconsideration. The High Court, allowing the application of the respondent in part, ordered the award to be remitted to the arbitrator for reconsideration. Against this decision the appellant appealed to the Court of Appeal.

Held, allowing the appeal and directing the arbitrator to proceed with the arbitration on the basis of his ruling regarding the admissibility of the documents in question:

(1) While the Act speaks of 'awards' and 'interim awards' neither of these terms are defined. The research of learned counsel for both parties failed to uncover a single case in this country where a ruling, made in the course of an arbitration, had been referred to the courts and remitted to the arbitrator for reconsideration. The cases uncovered on research were all on 'awards' and 'interim awards' (see p 337A).

(2) In this case, the decision of the arbitrator being challenged was merely a ruling that certain documents were not admissible. Even in a normal trial in courts of law, such rulings are not appealable.

A party has to wait until the end of the case before he can appeal against the final judgment, decision or order and, in arguing the appeal, argue on the correctness or otherwise of such rulings. To allow every ruling of an arbitrator in the course of the arbitration proceedings to be challenged in court would defeat the main purpose of arbitration and would border on an abuse of the process of the court (see p 339F–G).

(3) Such a ruling, as in the present case, was not the kind of 'matter' envisaged by s 23 of the Act. The respondent would have had to wait until the end of the arbitration proceedings and, when the award was handed down, he could then challenge the award and, in so doing, challenge the ruling. Thus, it would not be proper for the court to decide whether the ruling of the arbitrator excluding those documents was right or wrong at that stage. The issue was left open so that the respondent may challenge it, if and when he decided to challenge the award when made (see p 339G–H).

Per curiam:

The Court of Appeal accepted the views expressed in English case law which may be summarized as follows: (a) the courts had no power to supervise arbitration proceedings and to review interlocutory decisions of an arbitrator; (b) s 23(1) of the Act envisages the consideration by the court of a matter dealt with in an award; (c) the court had no power to order that an arbitrator should reconsider a pre-award ruling; (d) an exception to this may be an application to remove an arbitrator (s 24 of the Act) (see pp 338H–339A).

[Bahasa Malaysia summary

Pihak-pihak telah memasuki suatu perjanjian di mana perayu telah meminjamkan wang kepada responden yang membolehkannya mengambil bahagian dalam ekuiti suatu syarikat usahasama yang ditubuhkan pihak-pihak bersama-sama. Responden gagal membuat bayaran sepertimana diperuntukkan dalam perjanjian tersebut. Seorang penimbangtara telah dilantik oleh pihak-pihak bagi menimbangtara pertikaian antara mereka. Semasa timbangtara tersebut, responden ingin mengemukakan, antara lain, keterangan yang terdiri daripada surat-menyurat antara pihak-pihak. Perayu membantah kemasukan keterangan ini pada dasar bahawa surat-menyurat tersebut termasuk dalam karungan komunikasi 'without prejudice'. Setelah mendengar hujah-hujah peguam pihak-pihak, penimbangtara yang arif telah memutuskan bahawa dokumen-dokumen itu termasuk dalam prinsip 'without prejudice' dan tidak patut diterima. Responden memohon kepada Mahkamah Tinggi bagi suatu perintah supaya award yang diberikan penimbangtara tersebut

A ('award tersebut') diketepikan di bawah s 24(2) Akta Timbangtara 1952 ('Akta tersebut') atau secara alternatif, bahawa award tersebut dikembalikan kepada penimbangtara untuk dipertimbangkan semula. Mahkamah Tinggi, membenarkan sebahagian permohonan responden, telah memerintahkan bahawa award tersebut dikembalikan kepada penimbangtara untuk dipertimbangkan semula. Perayu telah merayu terhadap keputusan ini kepada Mahkamah Rayuan.

B

Diputuskan, membenarkan rayuan tersebut dan mengarahkan penimbangtara supaya meneruskan timbangtara tersebut berdasarkan keputusannya mengenai kebolehterimaan dokumen-dokumen berkaitan:

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(1) Walaupun Akta tersebut menyebut mengenai 'awards' dan 'interim awards' kedua-dua terma tersebut tidak ditafsirkan. Penyelidikan peguamcara kedua-dua pihak gagal mengenalpasti sebarang kes di dalam negara ini di mana satu keputusan dibuat dalam satu timbangtara, telah dirujuk kepada mahkamah dan dikembalikan kepada penimbangtara untuk dipertimbangkan semula. Kesemua kes yang dikenalpasti dalam penyelidikan adalah berdasarkan 'awards' dan 'interim awards' (lihat ms 337A).

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(2) Dalam kes ini, keputusan penimbangtara yang dicabar itu hanya merupakan satu keputusan bahawa dokumen-dokumen tertentu tidak dapat diterima. Dalam perbicaraan biasa dalam mahkamah undang-undang pun, keputusan sebegini tidak boleh dirayu. Pihak tersebut terpaksa menunggu sehingga penyelesaian kes tersebut sebelum beliau dapat merayu terhadap penghakiman muktamad, keputusan atau perintah dan, dalam membuat rayuan, berhujah mengenai kebetulan atau sebaliknya keputusan-keputusan tersebut. Jika semua arahan seseorang penimbangtara dalam sesuatu timbangtara dibenarkan dicabar dalam mahkamah ini akan bercanggah dengan tujuan utama timbangtara tersebut dan hampir menjadi suatu penyalahgunaan proses mahkamah (lihat ms 339F–G).

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(3) Sesuatu keputusan, seperti dalam kes ini, bukan 'matter' yang dijangka dalam s 23 Akta tersebut. Responden terpaksa menunggu sehingga penyelesaian prosiding timbangtara tersebut dan setelah award diberikan, beliau dapat mencabar award tersebut dan dalam membuat demikian, mencabar keputusan tersebut. Maka tidak wajar bagi mahkamah memutuskan sama ada keputusan penimbangtara supaya dokumen-dokumen tersebut dikecualikan adalah betul atau tidak pada peringkat itu. Isu tersebut ditinggalkan terbuka agar responden dapat mencabarnya, jika dan semasa beliau membuat keputusan untuk mencabar award yang diberikan (lihat ms 339G–H).

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Per curiam:

Mahkamah Rayuan menerima pandangan yang diberikan dalam kes Inggeris yang boleh diringkaskan seperti berikut: (a) mahkamah tidak mempunyai kuasa untuk mengawasi prosiding timbangtara serta mengkaji semula keputusan interlokutori seseorang penimbangtara; (b) s 23(1) Akta tersebut menjangkakan pertimbangan mahkamah di atas sesuatu perkara yang dilaksanakan dalam sesuatu award; (c) mahkamah tidak mempuyai kuasa mengarahkan seseorang penimbangtara supaya menimbangkan semula sesuatu keputusan yang dibuat sebelum award diberikan; (d) sesuatu permohonan untuk menyingkirkan seseorang penimbangtara mungkin satu pengecualian kepada ini (s 24 Akta tersebut) (lihat ms 338H–339A).]

Notes

For cases on setting aside of arbitration awards, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), paras 957–959.

Cases referred to

AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta) [1998] 2 MLJ 393 (refd)

Chiam Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority and another case [1994] 3 CLJ 605 (refd)

Exormisis Shipping SA v Oonsoo, The Democratic Peoples Republic of Korea and the Korean Foreign Transportation Corporation [1975] 1 Lloyd's Rep 432 (refd)

Fletamentos Maritimos SA v Effjohn International BV (No 2) [1997] 2 Lloyd's Rep 302 (refd)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49 (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)

Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd [1998] 6 MLJ 545 (refd)

King and another v Thomas McKenna Ltd and another [1991] 2 QB 480 (refd)

MCIS Insurance Bhd v Associated Cover Sdn Bhd [2001] 2 MLJ 561 (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Three Valleys Water Committee v Binnie & Partners (A Firm) (1990) 52 Build LR 42 (refd)

Legislation referred to

Arbitration Act 1952 ss 15, 23, (1), (2), 24, (1), (2),
Arbitration Act 1950 [Eng] s 22, (1)
Rules of the High Court 1980 O 69 r 2(1), O 69(4)(1)

Dominic J Puthucheary (*Firoz Hussein* and *Cheng Mai* with him) (*Puthucheary Firoz Asmet & Mai*) for the appellant.

Tommy Thomas (*Alan A Gomez* with him) (*Tommy Thomas*) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): The appellant and the respondent entered into an agreement dated 17 May 1996. Under the agreement, the appellant lent the respondent moneys to participate in the equity of a joint venture company established by the parties. The respondent defaulted under the agreement by failing to make payment as stipulated by the terms of the agreement.

Subsequently, Datuk George Seah was appointed by both parties to arbitrate in the dispute between the parties. During the course of the arbitration hearing, the respondent sought to admit, inter alia, evidence which comprised correspondence between the parties. The appellant objected to the admissibility of the said documents on the basis that they fell within the 'without prejudice' rule.

After hearing arguments of learned counsel for the parties, the learned arbitrator ruled, on 24 September 2001, that the documents in question fell within the 'without prejudice' rule and were therefore inadmissible.

The respondent applied to the High Court for the following orders:

(1) an order that the award ('the said award') handed down by the sole arbitrator, Datuk George Seah ('the arbitrator') on 24 September 2001 be set aside under s 24(2) of the Arbitration Act 1952 ('the Act');

(2) in the alternative, an order that the said award be remitted to the arbitrator for his reconsideration pursuant to s 23(1) of the Act;

(3) in the further alternative, an order under s 24(1) of the Act that the arbitrator, having misconducted himself in handing down the said award, be removed;

(4) further or other directions whether under the act or otherwise; and

(5) costs.

By an order dated 30 April 2002, the High Court ordered the decision to be remitted to the arbitrator for reconsideration pursuant to s 23(1) of the Act.

The appellant appealed to this court.

The first question to be decided is whether the decision of the arbitrator dated 24 September 2001 whereby he ruled that the documents in question were inadmissible because they fell within the 'without prejudice' rule is an 'award'.

First, it must be stated that the objection to the admissibility of the documents in question was raised 'during the submissions on the preliminary issue'. It was at that stage, after hearing submissions of learned counsel for both parties (by way of written submissions), that the decision to exclude the documents was made.

Section 23(1) of the Act provides:

> Power to remit award
>
> (1) In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

Section 24(1) and (2) provides:

> Removal of arbitrator and setting aside of award
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> (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
>
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

The word 'award' is not defined in the Act. The Act however does talk about 'interim award' (s 15) which is also not defined.

Reading s 23 there appears to be some ambiguity whether that section refers only to remission of 'awards' and nothing else. The heading (or the marginal note, as it used to be called) is 'power to remit award'. But sub-s (1) says '... the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator ...'.

This is then followed by the words 'Where an award is remitted, ...' in sub-s (2). 'Matters' mentioned in sub-s (1) appears to be wider than 'award' mentioned in sub-s (2). In other words, where the matter referred is an award and the award is remitted by the High Court to the arbitrator, then sub-s (2) applies.

Under s 24, an arbitrator may be removed before he hands down an award, or after he has handed down the award. In the latter case, the award may be set aside.

Order 69 r 2(1) of the Rules of the High Court 1980 ('RHC'), under which this application was made to the High Court provides:

> (1) Every application to the Court —
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> (a) to remit an award under section 23 of the Act; or
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> (b) to remove an arbitrator or umpire under section 24(1) of that Act; or
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> (c) to set aside an award under section 24(2) thereof, must be made by originating motion to a single Judge in Court.

Thus we see that the RHC refers to an application under s 23 of the Act as an application to remit an award which seems to support the contention of learned counsel for the appellant that only an award may be remitted under s 23. But, that seems to go against the wording of s 23 itself when it uses the word 'matters'.

A We shall now turn to case law.

Based on the research done by learned counsel for both parties, there does not appear to be a single case in this country where a ruling made in the course of an arbitration had been referred to court and remitted back to the arbitrator. The cases are on 'awards' and 'interim awards'.

B *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 was an application to set aside an award. *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105 was an application for the extension of the period of six weeks limited by O 69(4)(1) of the RHC to make an application to remit an award under s 23 of the Act. *Jeuro*
C *Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545 was an application to set aside two awards, one on liability and one on damages. *AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta)* [1998] 2 MLJ 393 was also an application to set aside an award. So are *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49, *Chiam Tau Tze & Anor v The*
D *Sarawak Land Consolidation and Rehabilitation Authority and another case* [1994] 3 CLJ 605. *MCIS Insurance Bhd v Associated Cover Sdn Bhd* [2001] 2 MLJ 561 concerned an 'interim award' on liability made and published by the arbitrator.

In these cases the meaning of 'award' and 'interim award' was
E discussed. We do think we have to repeat them or discuss them further. In our view, the decision made by the arbitrator in this case is clearly not an award or interim award. It is merely a ruling on the admissibility of documents.

What these cases show is that all applications made to court under s 23
F are in respect of awards or interim awards. In none of these cases was there an application made to challenge a ruling made in the course of the arbitration to exclude certain documents.

The English case of *Exormisis Shipping SA v Oonsoo, The Democratic Peoples Republic of Korea and the Korean Foreign Transportation Corporation* [1975] 1 Lloyd's Rep 432 offers an interesting illustration. Section 22 of the
G (English) Arbitration Act 1950 is in pari materia with the Malaysian s 23. In the course of the arbitration proceedings, the charterers applied to the umpire for an order giving them leave to amend their defence and counterclaim and to fix further hearing at which they would be entitled to be present and put forward their case. The umpire refused and the
H charterers applied to the court for an order compelling the umpire to rehear the case contending that the court had, under s 22(1) of the (English) Arbitration Act 1950, unfettered discretion to remit matters referred at any time for reconsideration by arbitrators. The application was dismissed. Donaldson J held:

I (1) the only power of the court to intervene in an arbitration was the statutory power contained in the Arbitration Act 1950 (see p 434, col 1); and there was no inherent power in the High Court to supervise arbitrators (see p 434, col 1);

(2) it was entirely a matter for Parliament to decide whether or not the High Court should have general supervisory jurisdiction (see p 434, col 2); and the court had no jurisdiction to accede to the application (see p 434, col 2).

In *Three Valleys Water Committee v Binnie & Partners (A Firm)* (1990) 52 Build LR 42, one of the issues was whether the arbitrator's decision refusing leave to serve pleadings out of time was a procedural mishap and whether the court could intervene. It was held by Steyn J:

(7) Moreover, s 22 envisaged the reconsideration of a matter dealt with in an award and there was therefore no power for the court to order that an arbitrator should reconsider a pre-award ruling ... .

The decision of the Court of Appeal in England in *Fletamentos Maritimos SA v Effjohn International BV (No 2)* [1997] 2 Lloyd's Rep 302 makes the position very clear. Briefly in that case, the arbitrator refused an application for discovery. Waller LJ, at p 306 said:

I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically the position is, as I understand the authorities, that the court has never had some general power to supervise arbitration and review interlocutory decisions. The power which it does have come from the Arbitration Acts. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under s 22 applies to awards. (See Mr Justice Donaldson (as he then was) in *Exormisis Shipping SA v Oonsoo*, [1975] 1 Lloyd's Rep 432; *Three Valleys Water Committee v Bunnie*, (1990) 52 BLR 47, a decision of Mr Justice Steyn (as he then was); and Lord Donaldson, MR in *King v Thomas McKenna Ltd*, [1991] 2 QB 480 at p 490B–C). In so far as the judge relied on s 22(1) (which speaks of matters rather than awards), as providing the power to review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well established authorities.

The judgment of Donaldson LJ in the (English) Court of Appeal case of *King and another v Thomas McKenna Ltd and another* [1991] 2 QB 480 makes it even clearer. His Lordship said at p 490:

Another distinction which has to be borne in mind is that in litigation there is a right of interlocutory appeal at every stage, subject only to restrictions as to time and the need to obtain leave. By contrast in arbitration, subject to certain exceptions such as the power to remove an arbitrator for bias, any intervention by the court can only occur after the award has been made.

We accept the views expressed in the English cases mentioned above which, perhaps, may be summarized as follows:

(a) the court has no power to supervise arbitration and to review interlocutory decisions of an arbitrator;

(b) s 22(1) (Malaysian s 23(1)) envisages the consideration by the court of a matter dealt with in an award;

(c) the court has no power to order that the arbitrator should reconsider a pre-award ruling;

(d) an exception is an application to remove an arbitrator (Malaysian s 24).

Coming back to the present case. The decision that is being challenged is the ruling of the arbitrator excluding certain documents. It is clearly not an award or an interim award. Following the views taken by the English courts on a similar provision of the law, the matter being referred to court in this case is clearly not envisaged by s 23 of the Act. Furthermore, to allow such a ruling to be referred to court and remitted back to the arbitrator under s 23 of the Act would slow down arbitration proceedings and defeat the whole purpose of arbitration. In an arbitration proceeding, as in a trial, an arbitrator or a judge would have to make numerous rulings along the way regarding admissibility of evidence, documentary or otherwise, whether a question may be allowed to be asked or not and so on. To allow every such ruling to be referred to court and remitted back to the arbitrator would seriously delay the proceedings before the arbitrator, what more, as in this case, where the decision of the High Court is appealed further and where there are a number of such applications and further appeals. It would also increase costs.

The purpose of arbitration is to settle a dispute outside court, to save time and costs and also to enable a more flexible procedure to be followed, unlike in a court of law. It is meant to take the dispute out of the normal process of court. That is why there is no right of appeal from a decision, order or judgment of an arbitrator. That is why the law provides that only in specific matters that applications may be made to court in respect of an arbitration proceedings. That is why the grounds on which the court may interfere with an award of an arbitrator are very limited — see for example *Hartela Contractors Ltd* and *Future Heritage Sdn Bhd.*

In this case, the decision of the arbitrator being challenged is merely a ruling that certain documents are not admissible. Even in a normal trial in courts of law, such rulings are not appealable. A party has to wait until the end of the case, appeal against the final judgment, decision or order and when arguing the appeal, argue on the correctness or otherwise of all those rulings. To allow every ruling of an arbitrator in the course of the arbitration proceedings to be challenged in court would defeat the main purpose of arbitration and borders on an abuse of the process of the court. In any event, we are of the view that that is not the kind of 'matter' envisaged by s 23 of the Act. The respondent should have waited until the end of the arbitration proceedings and when the award is handed down, challenge the award and in so doing challenge the ruling.

In light of the view that we have taken, it would not be proper for us to decide whether the ruling of the arbitrator excluding those documents is right or wrong at this stage. We leave the issue open so that the respondent may challenge it if and when he decides to challenge the award when made.

In the circumstances, we allow this appeal with costs and direct the arbitrator to proceed with the arbitration on the basis of his ruling regarding the admissibility of the documents in question.

A

We do not think it is necessary for us to discuss prayer (c) (removal of the arbitrator under s 24(1) of the Act). The learned judge did not make such an order nor did the parties argue that prayer before us. We take it that the prayer has been abandoned. Indeed it is irrelevant in view of the order made by the learned judge and by us in this appeal.

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Appeal allowed with costs. Arbitrator directed to proceed with the arbiration on the basis of his ruling regarding the admissibility of the documents in question.

Reported by Sivapragasam Kumaran

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